U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 565-5330
(202) 565-5325 (FAX)

DATE: January 26, 2001

CASE NO: 2000-INA-73

In the Matter of

UNITED FLIGHT ACCESSORIES OF CALIFORNIA
Employer

on behalf of

KEUN SHIN
Alien

Appearance: Thomas J. Stefanski, Esq. for Employer and Alien

Certifying Officer: Rebecca Marsh Day, Region IX

Before: Burke, Huddleston, and Jarvis
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from United Flight Accessories of California's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has

determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On July 18, 1995, the Employer filed a Form ETA 750 Application for Alien Certification with the California Employment Development Department ("EDD") on behalf of the Alien, Keun Shin. (AF 43-44). The job opportunity was listed as "Aircraft Mechanic" The job duties were described as follows:

Overhauls and repairs aircraft and aircraft engine accessories, including hydraulic, pneumatic, and mechanical appliances. Disassembles, inspects, reassembles, and tests accessories from F-5 Military Aircrafts. Confer with representatives from airlines in the Korean language.

(AF 43). The stated job requirements for the position, as set forth on the application, included the completion of highschool and 4 years experience in the job offered or in the related occupation of "Supervisor of Aviation Technique." (Id.). Other special requirements were listed as "Must speak, read, write Korean and English." (Id.). The language breakdown provided was "Korean 40%" and "English 60%." (Id.).

The CO issued a Notice of Findings ("NOF") on November 24, 1998, proposing to deny labor certification on two grounds. (AF 38-41). First, the CO found that the Employer's foreign language requirement was unduly restrictive. (AF 39). The Employer was instructed to either delete the foreign language requirement or to justify the requirement based on business necessity. (AF 39-40). Second, the CO found that the employment of the Alien would have an adverse effect on U.S. workers in violation of 20 C.F.R. 656.24(b)(3) due to the fact that the Alien lacks the FAA licenses to perform the tasks stated in the Form ETA 750-A, Box 13. (AF 40).

The Employer submitted its rebuttal to the NOF on December 28, 1998 and responded to each of the CO's findings. (AF 34-37). With regard to the restrictive foreign language requirement, the Employer first argued that the Employer "in no way disqualified applicants because of the REQUIREMENT." (AF 34). Employer explained that

no U.S. applicants responded to the advertisement for the position and therefore no applicant was rejected due to the foreign language requirement. Employer also asserted that even though the application should have been approved based on the above reason, the Employer had presented ample evidence to demonstrate the business necessity of including the requirement for the available position. (AF 35). Employer argued that the foreign language requirement is "of the utmost business necessity in that it is in the business of repairing aircraft parts and aircraft engine accessories." (Id). Employer asserted that in order to diagnose the problems with the aircrafts, the mechanics confer with the representatives from the airlines and airplane companies. In addition, Employer stated that the requirement is "essential to the adequate functioning of the employer's business, and there are no reasonable alternatives. Anything less than full communication between the Employer's client and the Mechanic can prove fatal and can result in unnecessary disaster." (AF 36). Employer further argued that it has recently suffered a loss of business to its competitors who have hired employees that speak Korean. (AF 37). With regard to the FAA Licenses, Employer asserted that the Alien is not required to have FAA licenses to perform the job duties for the offered position as it does not involve supervisory responsibilities. (AF 36). Despite Employer's assertions that supporting documentation was being submitted, no documents were submitted with the Rebuttal.

The CO issued a Second Notice of Findings ("SNOF") on June 14, 1999. (AF 31-33). The CO found that the NOF specifically directed Employer to submit documentation of its need for a Korean-speaking mechanic, however no documentation had been submitted thus far. (AF 32). The CO also addressed the fact that the while the Alien meets Employer's stated requirements, 20 C.F.R. 656.20(c)(7) states that the job offer must be compliant with Federal, State and local laws and regulations. The CO found that the occupation or the tasks to be performed usually require the job holder to be licensed. The Employer was instructed to either provide documentation showing clearly what job duties will temporarily be performed by the Alien until he or she has obtained a license and is legally able to perform the duties shown on the application, and that the Alien will be eligible to take the licensing examination, or show that the duties to be performed do not require a license. (Id).

On July 14, 1999, Employer submitted its rebuttal to the SNOF, and submitted documentation in support of the business necessity of the foreign language requirement. (AF 6-30). The documentation consisted of a the following: a letter from the President of an aircraft repair and maintenance distribution company attesting to the fact that job contracts with the Korean Air Force require the company to "farm-out" the repair to other aircraft repair and maintenance companies who can speak their native language; correspondence in the Korean language; invoices from Korea; and, a Master List Report indicating business with the Asian Customer ID. (AF 12-28). Employer also submitted documentation establishing that the Alien is not required to have FAA licenses to perform the job duties for the offered position. (AF 29-30).

The CO issued a Final Determination ("FD") on September 21, 1999, denying certification. (AF 4-5). The CO found that the Employer failed to provide sufficient documentation to rebut the finding that the foreign language requirement was unduly restrictive. (AF 5). Specifically, the CO stated that:

> You also contend in both rebuttals that you have lost business to companies with Korean-speaking mechanics, but provide no **documentation** of this fact. Lastly, the one item in Korean describes a target drone which doesn't appear to have any connection to the job you describe in box 13.

(Id.). The CO concluded that Employer failed to substantiate the need for the foreign language requirement.

On October 19, 1999, the Employer filed a Request for Review of Denied Labor Certification. (AF 1-3). The file was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA") for review. The Employer submitted a brief in support of its Appeal on January 21, 2000.

DISCUSSION

The CO's denial found that the Employer failed to submit documentation to support its contention that the Korean language requirement was not unduly restrictive. At the outset, we note that Employer's argument that no U.S. workers were rejected due to the foreign language requirement as no U.S. workers applied for the position is incorrect. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for, or qualify for, the job opportunity. The purpose of 656.21(b)(2) is to make a job opportunity available to qualified U.S. workers. *Venture International Associates*, 1987-INA-569 (Jan. 13, 1989) (*en banc*).

Section 656.21(b)(2)(i)(C) provides that the job opportunity shall not include a requirement for a language other than English unless the requirement is adequately documented as arising from business necessity. To establish business necessity, "an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer." *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). As applied to foreign language requirements, the first prong of the *Information Industries* standard requires the Employer to establish that a significant percentage of its business includes clients, co-workers, or contractors who speak the foreign language at issue. *Raul Garcia, M.D.*, 1989-INA-211 (Feb. 4, 1991); *Felician College*, 1987-INA-553 (May 12, 1989) (*en banc*). The law is not absolute on what percentage constitutes a significant percentage of business. We have held that one business that is dependent on a 20 to 30 percent use of Farsi has a significant percentage of its business at stake. *Mr. Isak Sakai*, 1990-INA-330 (Oct. 31, 1991). Other cases have indicated that a foreign language clientele of 23 percent is not significant. *See Washington International Consulting Group*, 1987-INA-625 (June 3, 1988). The second prong of the test requires that the Employer establish that the use of the foreign language is essential for the company to carry out the job duties in a reasonable manner. *See, Splashware Company*, 1990-INA-38 (Nov. 26, 1990). Documentary evidence supporting the required evidentiary showings must be furnished.

The issue in the instant case is whether the Employer has met its burden of establishing the business necessity of its foreign language requirement. The Employer's rebuttal submission included a letter from a company that uses Employer's services, correspondences in the Korean language, invoices from Korea and a document indicating an

Asian customer's identification. Employer stated that recently, the company has suffered loss of business to competitors who have hired employees that speak Korean, and explained that:

> Besides the financial loss due to our inability to find a qualified mechanic who speaks Korean, we believe that the quality of our service will improve by hiring an Airframe and Power Plant Mechanic who is able to speak the Korean language of our clients. Certainly, communication can be a matter of life and death when you are dealing with mechanical repairs to an aircraft. ... There is no doubt that hiring a person for the offered position that speaks Korean will enable us to maintain our safety record and remain competitive in an expanding and global industry.

(AF 10).

We find that the Employer has not met its burden of establishing the business necessity of its foreign language requirement. First, the sample correspondence in the Korean Language does not show that a significant percentage of the Employer's business includes clients who speak the foreign language. Second, the invoices only show that work was done for a Korean company, they do not show that the Korean language was spoken, especially in light of the fact that the invoices were in English. (AF 17-22). Third, the Master List Report does show business with an Asian customer identification, but it does not show that the required language was spoken when conducting this business, nor does it show what percentage of its business is with the customer identified as "asian." (AF 23-28). Finally, the letter submitted from the president of another company asserting that it needs to "farm-out" orders from the Korean Air Force does not establish that the Korean language is essential for the reasonable performance of the job duties, as required by the second prong of the standard set forth in *Information Industries*. (AF 12). While this letter is somewhat persuasive, we find that it is too general to show that clients of this particular Employer prefer to do business in Korean. *See Intelligent Computer Solutions*, 1995-INA-353 (June 5, 1997). In addition, we note that the fact that another company may lose the business of the Korean Air Force to a company "more suited" for the job does not necessarily mean that Employer would lose this business as well. Employer has not submitted any evidence documenting the number of its current mechanics who are able to communicate in Korean and Employer has failed to submit any documentation showing that it would lose business without a Korean-speaking mechanic.

In this case, we believe that the CO correctly found that the Employer's written assertions alone did not support a finding that the Korean language requirement was based on business necessity. Although a written assertion constitutes documentation that must be considered under *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Accordingly, we find that the Employer has failed to show that a significant portion of its business includes clients who speak the required foreign language or that the use of the required language is essential for the company to carry out the job duties on a reasonable manner. The Employer is offering the job opportunity with an unduly restrictive requirement and, as such, the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is **AFFIRMED**.

For the Panel:

DONALD B. JARVIS
Administrative Law Judge

San Francisco, California